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HUMAN RIGHTS COMMITTEE

Sixty-fourth session

SUMMARY RECORD OF THE 1709th MEETING

Held at the Palais des Nations, Geneva,
on Friday, 23 October 1998, at 3 p.m.

Chairperson: Ms. CHANET

later: Mr. EL-SHAFEI
(Vice-Chairperson)

later: Ms. CHANET
(Chairperson)

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GE.98-19012 (E)

The meeting was called to order at 3.20 p.m.

GENERAL COMMENTS OF THE COMMITTEE (agenda item 5) (continued)

Draft General Comment on article 12 of the Covenant (CCPR/C/21/Add.9/Rev.1)

1. The CHAIRPERSON invited members to consider and to adopt, paragraph by paragraph, the draft General Comment on article 12 of the Covenant (CCPR/C/21/Add.9/Rev.1).

Paragraph 11

2. Mr. KLEIN, Chairman/Rapporteur of the Working Group on article 40, said that the purpose of the general comments was to help States in their preparation of reports and the paragraph was aimed at indicating certain conditions that should be fulfilled, in particular, ensuring that there were no gaps in the information provided.

3. Ms. MEDINA QUIROGA suggested that, in the second sentence, the words "both to nationals and foreigners" should be inserted between "their territory" and "in order to".

4. It was so decided.

5. Ms. EVATT requested clarification of the third sentence, reading "The same applies to legislation and other measures that affect the possibility of a person to leave another country, for instance through the imposition of carrier sanctions that prevent persons wishing to leave their own country from boarding an airplane, a ship or a train." Did it refer to measures that prevented travel to specific countries, or rather, to those that prevented persons from leaving countries other than their own?

6. Mr. KLEIN, Chairman/Rapporteur of the Working Group on article 40, said the sentence had been proposed by Mr. Scheinin and was intended to alert States to the need to report on any measures that created sanctions which made it more difficult for people to leave their own countries, such as the fines imposed on airlines for transporting persons not possessing the necessary travel documents. The sentence did not say that such measures could not be instituted, but that they had to be shown to conform to article 12, paragraph 3, of the Covenant.

7. Mr. SCHEININ said that under article 12, paragraph 2, States had an obligation not only to permit people to leave their own territory but also not to create obstacles for people wishing to leave other countries. The first sentence of paragraph 11 spoke of "the right to leave, in particular, a person's own State", indicating that the obligation did not apply exclusively to the right to leave one's own State but extended to the right to leave the territory of other countries as well.

8. It was especially useful to make that clear in respect of carrier sanctions, through which States delegated to private operators their own border controls, resulting in the actual conduct of such controls in the territory of another country. As a result, persons could be prevented not

only from entering but also from leaving their own country. Such restrictions on freedom of movement had to be reported by States and justified under article 12. It was all the more necessary to make that plain, for carrier sanctions were being imposed more and more often.

9. Ms. EVATT proposed that the third sentence should be amended in the light of the explanation offered by Mr. Scheinin. It would then read: "The same applies to legislation and other measures that may limit the right of a person to leave another country, for instance by imposing sanctions on international airlines or other carriers that may prevent persons wishing to leave that country from boarding an airplane, a ship or a train."

10. Mr. BHAGWATI said the sentence was about a fairly complex problem: the effects on the ability of a person to leave a country that were caused by carrier sanctions on persons wishing to leave their own country. Many airlines refused to carry passengers who did not have visas because, if a country refused them entry, the airline would have to bear the cost of transporting the passenger back to his or her point of departure.

11. Ms. MEDINA QUIROGA said the issue was whether, when country A imposed sanctions and a person wished to leave country B, compliance with the Covenant would require country B not to respect those sanctions.

12. Mr. ANDO said the logic behind the third sentence was flawed. The sanctions envisaged were those that prevented persons from leaving their own countries. States had exclusive sovereignty to regulate the entry of aliens, however, and article 12 could not be construed as prohibiting them from imposing sanctions that did so.

13. Mr. LALLAH pointed out that, in some cases, the State in which the border controls were carried out might not be a party to the Covenant.

14. Mr. SCHEININ said it was in precisely those cases that there was real justification for requesting States to report. He endorsed the formulation proposed by Ms. Evatt, with the proviso that "another country" as used in the third sentence meant a person's own country. Carrier sanctions or similar measures, when imposed by several countries, had the effect of preventing persons from leaving their own country. It was important to make the point set out in the third sentence in order to emphasize that States could not evade their international responsibilities simply by delegating border controls to private operators. States might then, during the discussion of their periodic reports, give the Committee convincing factual information to show that people were not in fact prevented from leaving their territory by the carrier sanctions they imposed.

15. Mr. POCAR said he could agree to an appropriate formulation to cover situations in which the imposition of sanctions by a number of countries could ultimately result in a violation of the right to leave. The present text could however, apply to situations where State A imposed sanctions in order to prevent citizens of State B from entering State A, something which did not run counter to international law.

16. Ms. EVATT said if a person was in Indonesia, for example, but wanted to leave to seek asylum elsewhere, the only way to do so was by air or sea travel, but the choice of destination was limited by the service lines of air and sea carriers. Australia, by imposing sanctions on carriers for bringing in persons without valid travel documents, could indirectly prevent the person from leaving Indonesia. States should simply be asked to report on measures that could have such an effect.

17. Lord COLVILLE said that, according to the sentence as now formulated, States would have to provide an excessive amount of information that was not entirely relevant to the right to leave a country. The United Kingdom, for example, would have to provide the entire list of countries for whose citizens a visa was required and to explain the treatment given to persons who chose to dispose of their travel documents en route so that they could claim asylum on arrival - a frequent occurrence. If Mr. Bhagwati, for example, wanted to leave India, the requirement of a visa for entry into the United Kingdom would not prevent him from going to a country other than the United Kingdom. He did not see how the sentence would advance the Committee's understanding of the State party's compliance with article 12 and was opposed to including it in the draft.

18. Ms. MEDINA QUIROGA said the sentence was intended to indicate that the use by a State of carrier sanctions as a means to prohibit entry into that State was not compatible with the Covenant. A State had a right to prohibit people from entering its territory, but it must not use carrier sanctions as a means of preventing persons from leaving other countries.

19. Mr. BUERGENTHAL said he endorsed Lord Colville's opposition to the sentence, which seemed to present insuperable drafting difficulties.

20. Mr. BHAGWATI agreed that the sentence should be deleted. It created more problems than it solved.

21. Mr. SCHEININ said he could not agree to deletion but would try to reformulate it in concert with Ms. Evatt. Lord Colville's concerns about the reporting difficulties States might experience were legitimate, but if the information was relevant to the exercise of rights under the Covenant, the Committee had to request it.

22. In reality, carriers were increasingly operated jointly by members of the European Union, and the right of people to leave countries in certain parts of the world was clearly affected by such joint operations. The issue was a serious one that had to be addressed: one could hardly speak of the right to asylum and protection against refoulement if people were barred from access to territories where they could present requests for such protection.

23. Mr. ANDO said Mr. Scheinin's reading of article 12, paragraph 2, was difficult to accept. He himself interpreted it as meaning that no country in the world, whether it was a person's country of residence or of nationality, had the right to prevent him or her from leaving its territory. He would like to see a concrete proposal from Ms. Evatt and Mr. Scheinin for the wording of the third sentence; otherwise, it should be deleted.

24. The CHAIRPERSON said that, if she heard no objection, she would take it that the Committee wished to adopt the first two sentences of paragraph 11, as amended by Ms. Medina Quiroga, and to defer consideration of the third sentence pending reformulation by Ms. Evatt and Mr. Scheinin.

25. It was so decided.

Restrictions (para. 3)

Paragraph 12

26. Mr. KLEIN, Chairman/Rapporteur of the Working Group on article 40, said the paragraph was intended as a general introduction to the philosophy of the idea of restriction of rights under article 12.

27. Mr. KRETZMER, referring to the last sentence, wondered whether the reference to a democratic society was necessary in the context. The Covenant itself spoke of a democratic society in connection with the right to freedom of association (art. 22), but not elsewhere. He would prefer the reference to be deleted. Secondly, he doubted whether the mention of "the rights and freedoms of others", in the fourth sentence, was compatible with the concept of "certain interests of the community as a whole", contained in the first sentence.

28. The CHAIRPERSON said that she was not convinced of the necessity for paragraph 12, which seemed merely to paraphrase the ideas contained in article 12, paragraph 3. In particular, she wondered whether an enumeration of the "permissible purposes" of restrictions was advisable.

29. Mr. KLEIN, Chairman/Rapporteur of the Working Group on article 40, said that while he would have no objection to the paragraph being shortened or otherwise amended, it must be maintained in some form. The object of General Comments was surely to underline what was already to be found in the articles themselves. In the present instance, the point to be made was that any restriction imposed by States must be specifically subsumed under the requirements of article 12, paragraph 3. With regard to the reference to a democratic society, during the discussion of the draft General Comment in New York several members had taken the view that the provision could only be applicable in a democratic society and would otherwise be devoid of meaning. As to Mr. Kretzmer's other point, he understood the protection of the rights and freedoms of the individual to form part of the collective interest.

30. Ms. MEDINA QUIROGA said that she strongly supported the inclusion of a reference to a democratic society and was generally satisfied with the wording of paragraph 12 as it stood.

31. Ms. EVATT said that she had no objection to the reference to a democratic society, although its inclusion in the context of paragraph 15 seemed more appropriate. On the other hand, she did object to the idea of "striking a balance", incorporated in the first sentence. The provisions of article 12, paragraph 3, should not be seen as a balancing exercise; the Covenant should defend the rights it proclaimed unless the necessity for imposing restrictions was clearly established. The first sentence might be

amended to read: "Article 12, paragraph 3, is intended to identify areas where it may be justifiable to restrict the rights under paragraphs 1 and 2 in order to protect or to promote those legitimate goals". The best course would be to avoid the reference to the very broad concept of the "interests of the community as a whole".

32. Mr. WIERUSZEWSKI said that he was in favour of maintaining the paragraph, which established a conceptual framework for the provisions of article 12, paragraph 3. Many countries looked to the Committee's General Comments for guidance. He was also in sympathy with Ms. Evatt's suggestion regarding the first sentence.

33. Mr. POCAR said that, while agreeing with Ms. Evatt about the need to omit the reference to striking a balance, he was not happy to see that what was couched in negative terms in article 12, paragraph 3, should be placed in positive terms. In his view, that was the wrong approach. The last sentence should be redrafted so as to make it clear that restrictions could be applied only by way of exception. The third sentence should be rewritten or, better still, simply eliminated.

34. Mr. LALLAH said that he entirely agreed with Mr. Pocar. It should be made clear that any restriction on the rights in question must be strictly limited to the purposes of the Covenant. As for the reference to a democratic society in the last sentence, he feared that the injection of political overtones might reduce the chances of achieving the desired effect. The reference should be deleted.

35. Mr. BUERGENTHAL said that he agreed with both Ms. Evatt and Mr. Pocar and thought that their suggestions concerning the first sentence could be combined. The last sentence could be redrafted to read: "To be permissible, these restrictions must be provided by law, must be necessary ...". The paragraph should also include a mention of article 5, paragraph 1. Again, following the political changes of the past few years, the Committee had increasingly tended to include references to "a democratic society" in all its texts. Lastly, in the second sentence, the word "only" should be included between "above-mentioned rights" and "in order to protect".

36. Lord COLVILLE said that he agreed with Mr. Pocar's suggestion to rephrase the paragraph in negative rather than positive terms. On the question of restrictions in general, he thought that the concept of balance seemed valid. Restrictions might be necessary where the rights of the individual had to be balanced against those of the community and also where the rights of the individual had to be balanced against those of the rights and freedoms of others. The word "necessary" in the first sentence carried sufficient implications of a proper balance. The concept of balance should be included, at least at the descriptive stage.

37. Mr. BHAGWATI said that he agreed with Mr. Buergenthal's suggestion regarding the last sentence. The first sentence should be redrafted to reflect the points raised by Ms. Evatt and Mr. Pocar; the third sentence should be deleted; and the second and fourth sentences, in shortened form, should be merged to read: "This provision authorizes States to restrict the

above-mentioned rights only in order to protect national security, public order (ordre public), public health or morals and the rights and freedoms of others."

38. The CHAIRPERSON said that members appeared to be in broad agreement on most of the issues raised in connection with paragraph 12, except for the use of the words "a democratic society" in the last sentence. For her part, she tended to agree with Mr. Lallah that such a reference was undesirable in that context.

39. Ms. MEDINA QUIROGA said she strongly felt that a reference to a democratic society should appear somewhere in the General Comment. If it was removed from paragraph 12, could it perhaps be inserted in paragraph 16?

40. Mr. KLEIN, Chairman/Rapporteur of the Working Group on article 40, pointed out that article 5, paragraph 1, was mentioned in paragraph 14. Perhaps that would meet Mr. Buergenthal's point.

41. Following a brief discussion in which Ms. EVATT, Mr. KLEIN, Mr. BUERGENTHAL, Mr. LALLAH and Mr. ANDO took part, Mr. BHAGWATI proposed that paragraph 12 should be redrafted to read:

> "Article 12, paragraph 3, provides for exceptional circumstances in which the rights under paragraphs 1 and 2 may be restricted. This provision authorizes the State to restrict these rights only in order to protect specific values, namely, national security, public order (ordre public), public health or morals and the rights and freedoms of others. To be permissible, these restrictions must be provided by law, must be necessary for the protection of these purposes, and must be consistent with all the other rights recognized in the Covenant (see paras. 19 and 20, below)."

42. It was so decided.

Paragraph 13

43. Mr. POCAR proposed that the words "may be founded" in the penultimate sentence of paragraph 13 should be amended to read "are founded". He was also unsatisfied with the words "enabling law", in the last sentence, since they implied that States possessed some form of discretionary authority to restrict rights.

44. Mr. KRETZMER said the first few words of the paragraph implied that some rights protected by the Covenant were more important than others. They should be deleted.

45. Under the system of constitutional law with which he was familiar, it was the legislature that determined any restrictions on fundamental rights but that was not necessarily the case under common law. The first sentence should be worded in such a way as to take all legal systems into account.

46. Mr. BHAGWATI agreed that the first few words of the paragraph should be deleted. The last sentence should be reworded to read: "If the law providing

for the restrictions is not in conformity with the requirements of article 12, paragraph 3, such restrictions would violate the rights under paragraphs 1 or 2."

47. In his own country, a law enacted by the legislature was required if fundamental rights were to be restricted. Common law would not be viewed as taking precedence over constitutionally or legally guaranteed rights.

48. Lord COLVILLE said that the situation described by Mr. Bhagwati was not universal. The Committee had consistently overlooked the case of restrictions that were necessary to protect the rights and freedoms of others, for example the prohibition of trespassing, which was not a statutory matter but a common-law concept. He therefore agreed with Mr. Kretzmer that the first sentence of paragraph 13 was too narrowly formulated.

49. Mr. KLEIN, Chairman/Rapporteur of the Working Group on article 40, suggested that "the legislature" should be amended to read "the law".

50. The CHAIRPERSON said that the reference to local banishments, in the third sentence, was too restrictive. No administrative measure designed to restrict liberty of movement and freedom to choose one's residence would enjoy the necessary legal basis.

51. Mr. KLEIN, Chairman/Rapporteur of the Working Group on article 40, said that the reference to local banishments was merely intended as an example. He proposed that the sentence should be deleted.

52. Mr. BUERGENTHAL proposed that the second sentence should be amended to read "Mere executive or administrative decrees or orders do not meet this standard".

53. Paragraph 13, as amended, was adopted.

54. Mr. El Shafei took the Chair.

Paragraph 14

55. Mr. KLEIN, Chairman/Rapporteur of the Working Group on article 40, said that paragraph 14 addressed the problem of the wide range of exceptional circumstances listed in article 12, paragraph 3, in which restrictions on the rights recognized in paragraphs 1 and 2 were permissible. States might be tempted to take liberties in their interpretation of those circumstances: hence the reference to article 5, paragraph 1.

56. Mr. BHAGWATI proposed that the last sentence of the paragraph should be deleted. The previous sentence had already made the point that the enjoyment of the rights concerned were not dependent on the discretion of the executive.

57. Mr. POCAR said he agreed with Mr. Bhagwati.

58. He was unhappy with the idea implicit in the first sentence of a "broad" interpretation of the purposes for which restrictions were permitted. He would prefer to describe them as imprecise and to advocate a narrow

interpretation on the part of States. The second sentence stressed that the restrictions imposed by States should not jeopardize the essence of the rights protected by article 12, but they must also, according to paragraph 3 of article 12, be consistent with the other rights recognized in the Covenant.

59. Ms. MEDINA QUIROGA proposed that the first sentence should be reworded to read: "As the purposes for which restrictions are permitted under article 12, paragraph 3, are framed in fairly general terms, it is in principle for the States parties to give them concrete form."

60. Mr. BHAGWATI said that Mr. Pocar's idea of the need for a narrow interpretation of the purposes for which restrictions were permitted should be reflected in the second half of the first sentence.

61. Mr. KRETZMER said that the wording proposed by Ms. Medina Quiroga conveyed the impression that States were bound to restrict rights. He would prefer to say that "it is for the States parties to determine the relevant rules".

62. Ms. EVATT proposed that the first and second sentences should be combined so as to read: "In giving concrete form to the restrictions permitted under article 12, paragraph 3, States should always take into account the fact that they must not jeopardize the essence of the right (cf. art. 5, para. 1) ...". She supported the proposal to delete the last sentence.

63. Mr. BUERGENTHAL, supported by Mr. KLEIN, suggested a modified version of Ms. Evatt's proposal for the first sentence: "In adopting and applying laws imposing the restrictions permitted by article 12, paragraph 3, States should always be guided by the principle that the restrictions must not jeopardize the essence of the right (cf. art. 5, para. 1) ...".

64. Mr. ANDO, referring to the third sentence, said that laws often entrusted the executive with responsibility for deciding whether, for example, the movement of a particular person would jeopardize national security. The main thing was to ensure that the law provided for judicial review of the executive's decision in such cases.

65. Ms. EVATT proposed that the word "unfettered" should be inserted before "discretion".

66. Mr. WIERUSZEWSKI said he supported Ms. Evatt's proposal. The executive certainly possessed discretionary authority, but it was limited by the rule of law and should be subject to judicial review.

67. Mr. POCAR said that the idea of limited discretionary power belonged in paragraph 15 rather than paragraph 14.

68. Ms. MEDINA QUIROGA said that, in her opinion, the idea had already been expressed in the sentence "Mere executive or administrative decrees or orders do not meet this standard", in paragraph 13.

69. Lord COLVILLE pointed out that, while paragraph 13 referred to the need for a legislative or common-law basis for restrictions of rights, paragraph 14 stressed that the executive should not have unfettered authority when it came to implementing the law.

70. Mr. KLEIN, Chairman/Rapporteur of the Working Group on article 40, said that that point was already covered by the sentence "Mere executive or administrative decrees or orders do not meet this standard", in paragraph 13. The third sentence was therefore unnecessary and could be deleted.

71. Lord COLVILLE said that, as he saw it, paragraphs 13 and 14 embodied two separate concepts. Paragraph 13 established that any restrictions had to have a legislative or common-law basis, but paragraph 14 introduced a further important refinement, namely that acts by the executive implementing those restrictions should not be unfettered. It was therefore important to keep both sentences.

72. Mr. KLEIN, Chairman/Rapporteur of the Working Group on article 40, suggested that the formulation "This principle must also be respected by the executive" might meet that concern. However, he maintained his view that such a sentence was not really necessary.

73. Lord COLVILLE considered that it would be dangerous to delete the sentence, since although the law established the principle that restrictions could apply in certain circumstances, it was for governmental authorities or administrative tribunals to decide how that principle should be applied in individual cases. It was an important point and should not be omitted.

74. Mr. BHAGWATI, supported by Mr. ANDO, said that the sentence was essential in order to establish the distinction between legislative and administrative decisions. He proposed that it should be amended to read "... dependent on the arbitrary or unguided discretion of the executive".

75. Ms. MEDINA QUIROGA suggested that the formulation "In implementing the law, the executive is also subject to paragraph 3" would make the point more clearly.

76. Mr. BUERGENTHAL proposed that the sentence in question should read "The laws authorizing the application of these restrictions may not confer discretion on those charged with their execution." The last sentence would then be deleted.

77. Paragraph 14, as amended by Mr. Buergenthal, was adopted.

Paragraph 15

78. Lord COLVILLE proposed that the words "or valid private rights or freedoms" should be added after "A pressing social need", in the second sentence.

79. Ms. EVATT said that what needed to be made clear in the paragraph was that in the Committee's view "necessary" meant "necessary in a democratic society" - the expression used in articles 21 and 22 of the Covenant.

80. Mr. KRETZMER said he saw no need to use that expression, since it was already implicit in the third sentence, which referred to "the principle of proportionality". The expression did not appear in article 12, and to include it in that context in the General Comments could be dangerous, since it would give the impression that the Committee was not aware of the difference between article 12 and articles 21 and 22. He therefore proposed that it should be deleted.

81. Mr. BHAGWATI proposed that for greater emphasis the third sentence should be amended to read "... they must be the least restrictive from among those which may achieve the desired result".

82. Mr. KLEIN, Chairman/Rapporteur of the Working Group on article 40, said that despite his initial hesitation, he had included the expression because there was an important correlation between democracy, law and liberty, and the Committee had always urged States parties to base their legal order on that correlation. However, it was true that the rest of the paragraph made clear what was meant by "necessary", and the words could therefore be deleted without affecting the substance. He could accept Lord Colville's proposal, which remedied an important omission.

83. Ms. Chanet resumed the Chair.

84. Ms. MEDINA QUIROGA, supported by Ms. EVATT, said it should be borne in mind that in many countries the Covenant formed part of domestic law, and thus the Committee's General Comments would be important in implementing that law. It was crucial that the words "in a democratic society" be retained, since restrictions on rights were very often evaluated in terms of the State's political needs.

85. Mr. BHAGWATI said he would have no objection to retaining the expression, since it provided the context in which the test of proportionality could be applied. However, he did not think it necessary to add "or valid private rights or freedoms" in the second sentence, since it was to be assumed that "a pressing social need" would include the rights and freedoms of others.

86. Mr. SCHEININ pointed out that the rights and freedoms of others were already referred to in paragraph 12, and restrictions on them were dealt with in paragraph 17. Although the proposed addition could be made to the latter paragraph, he would be opposed to including it in paragraph 15, since that would give the impression that private rights or freedoms were an alternative to pressing social need.

87. Mr. LALLAH, referring to the penultimate sentence, wondered whether the words "to a certain place for an indefinite period" were necessary, since internal banishment in itself was a violation of article 12.

88. Mr. ANDO pointed out that article 19, paragraph 3, specifically defined two purposes for which restrictions on certain rights could be necessary. He agreed with Mr. Kretzmer that there was no need to include mention of a *democratic society in paragraph 15*, a concept that would be better dealt with elsewhere in the text.

89. Lord COLVILLE said he would be satisfied if his proposed addition was included in paragraph 17. In the course of the discussion on paragraph 8 it had been agreed that freedom to choose one's residence should be protected by law. It therefore followed that the rights and freedoms of others would have to be mentioned somewhere in the text.

90. Mr. BUERGENTHAL proposed that the second part of the first sentence should be amended to read: "... they must be necessary to protect them, which is to say that they must be necessary in a democratic society, be compelled by a pressing social need, and be proportionate to the achievement of the intended objective".

91. Mr. ANDO pointed out that a distinction should be made between articles 21 and 22, which related to group or collective rights, and article 17, which related to individual rights. It might not be appropriate to try and combine the two.

92. The CHAIRPERSON said that, since agreement on paragraph 15 had not yet been reached, discussion would be continued at a later stage. She herself was inclined to agree that the criterion "necessary in a democratic society", which was referred to in other articles, should not also be introduced in connection with article 12, which made no mention of it.

93. Mr. KLEIN, Chairman/Rapporteur of the Working Group on article 40, said members of the Committee would need to reflect further on that issue. As to Mr. Lallah's suggestion, he was not sure that internal banishment as such would necessarily constitute a violation of article 12.

The meeting rose at 6.05 p.m.